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8 SCOTT JOHNSON,  
9 Plaintiff,  
10 v.  
11 JOSEPH P. MELEHAN, et al.,  
12 Defendants.

13 Case No.[5:16-cv-04064-HRL](#)  
14

15 **ORDER DENYING WITHOUT  
16 PREJUDICE MOTION FOR SERVICE  
17 BY PUBLICATION**

18 Re: Dkt. No. 15

19 Plaintiff Scott Johnson sues under the Americans with Disabilities Act (ADA), 42 U.S.C. §  
20 12101, *et seq.*, and related state law. He alleges that architectural barriers at a shopping center in  
21 San Jose, California owned by defendants prevented him from enjoying full and equal access at  
22 the facility. Johnson says that despite numerous service attempts, he has been unable to serve any  
23 of the defendants. He moves for an order permitting service by publication.

24 Fed. R. Civ. P. 4 permits service of process as allowed by “state law for serving a  
25 summons in an action brought in courts of general jurisdiction in the state where the district court  
26 is located or where service is made.” Fed. R. Civ. P. 4(e)(1). In California, “[a] summons may be  
27 served by publication if upon affidavit it appears to the satisfaction of the court in which the action  
28 is pending that the party to be served cannot with reasonable diligence be served in another  
manner specified in this article and that,” as relevant here, “[a] cause of action exists against the  
party upon whom service is to be made or he or she is a necessary or proper party to the action.”

1 Cal. Code Civ. Proc. § 415.50(a). “Other methods [of service under California law] include  
2 personal service, substitute service on a person found at the defendant’s usual residence or place of  
3 business and subsequent mailing, service by mail with confirmation of receipt, and service by mail  
4 on defendants outside the state of California.” *Cummings v. Hale*, No. 15-cv-04723-JCS, 2016  
5 WL 4762208, at \*1 (N.D. Cal., Sept. 13, 2016); Cal. Code Civ. Proc. §§ 415.10, 415.20, 415.30,  
6 415.40.

7 Because of due process concerns, service by publication is allowed only as a last resort:

8 [T]he least likely [method of service] to succeed in notifying the defendant  
9 of an action against him is service by publication. For this reason, a court  
10 must first be convinced that the party to be served “cannot with reasonable  
11 diligence be served in another manner specified in [Article 3].” (§ 415.50.)  
12 “If a defendant’s address is ascertainable, a method of service superior to  
13 publication must be employed, because constitutional principles of due  
14 process of law, as well as the authorizing statute, require that service by  
15 publication be utilized only as a last resort.” (*Watts v. Crawford*, [10 Cal.  
16 4th 743, 749 n.5 (1995)] ). In this context, “[t]he term “reasonable  
17 diligence” . . . denotes a thorough, systematic investigation and inquiry  
18 conducted in good faith by the party or his agent or attorney. [Citations.] A  
19 number of honest attempts to learn defendant’s whereabouts or his address  
20 by inquiry of relatives, . . . and by investigation of appropriate city and  
21 telephone directories [voters’ registries and the assessor’s office property  
22 indices situated near the defendant’s last known location] generally are  
23 sufficient.”” (*Ibid.* quoting Judicial Council com., § 415.50.)

24 *Cummings*, 2016 WL 4762208 at \*2 (quoting *Bd. of Trustees of the Leland Stanford Junior Univ.*  
25 *v. Ham*, 216 Cal. App. 4th 330, 337-38 (2013)).

26 Here, plaintiff’s counsel avers that they searched business and property records using the  
27 TransUnion/TLO XP search engine’s California Ultimate Weapon Database and discovered two  
28 mailing addresses (one in San Jose, California and one in Truckee, California) for defendant  
Melehan, as well as one address for defendant Machado in Los Gatos, California. (Dkt. 15-1,  
Allen Decl., ¶¶ 2-4). Counsel further states that they hired process servers, who reportedly  
attempted service on defendant Melehan eight times at the San Jose address and six times at the  
address in Truckee, without success. (*Id.* ¶ 5-7). Counsel then sent a Notice of Acknowledgement  
and Receipt of Summons and Complaint to Melehan at both addresses, but did not receive a  
signed or returned notice. (*Id.* ¶¶ 8-9). Similarly, after seven unsuccessful service attempts  
reportedly were made at defendant Machado’s Los Gatos address, counsel mailed a Notice of

1 Acknowledgement and Receipt of Summons and Complaint to Machado, but did not receive a  
2 signed or returned notice. (*Id.* ¶¶ 10-11, 13). The process server reportedly made two further  
3 service attempts on Machado, without success. (*Id.* ¶ 12).

4 Plaintiff's motion for service by publication will be denied without prejudice because the  
5 present application suffers from two chief deficiencies:

- 6 1. Counsel has submitted process server affidavits attesting to service attempts, but  
7 the affidavits are not signed.
- 8 2. As discussed above, in addition to due diligence, plaintiff must also demonstrate  
9 that “[a] cause of action exists against the party upon whom service is to be made  
10 or he or she is a necessary or proper party to the action.” Cal. Code Civ. Proc. §  
11 415.50(a). In order to meet this requirement, plaintiff “must offer ‘independent  
12 evidentiary support, in the form of a sworn statement of facts, for the existence of a  
13 cause of action against the defendant.’” *Cummings*, 2016 WL 4762208 at \*2  
14 (citing cases); *Harris v. Cavasso*, 68 Cal. App.3d 723, 726 (1977) (holding that  
15 Section 415.50(a)(1) requires “an affidavit containing a statement of some fact  
16 which would be legal evidence, having some appreciable tendency to make the [the  
17 cause of action] appear, for the Judge to act upon before he has any jurisdiction to  
18 make the order” authorizing service by publication). Here, plaintiff has submitted  
19 his counsel’s declaration attesting to the efforts made to locate and serve the  
20 defendants, but otherwise relies solely on the allegations of his complaint. That is  
21 not sufficient. See *Cummings*, 2016 WL 4762208 at \*3 (denying an application for  
22 service by publication where plaintiff submitted her counsel’s disclosure statement  
23 that did not purport to be an affidavit, was not sworn, and did not demonstrate  
24 counsel’s personal knowledge of the facts at issue).

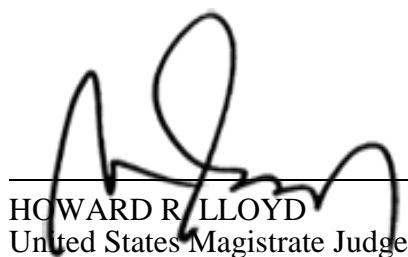
25 If plaintiff chooses to renew his motion for service by publication, he must file his renewed  
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1 motion by March 27, 2017.

2 SO ORDERED.

3 Dated: March 14, 2017

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6 HOWARD R. LLOYD  
7 United States Magistrate Judge  
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